**KMS BUILDERS SDN BHD**

**v.**

**HAZAMA CORPORATION**

HIGH COURT MALAYA, KUALA LUMPUR
FAIZA TAMBY CHIK J
[ORIGINATING SUMMONS NO: R2-24-33-2000]
16 JANUARY 2001

***ARBITRATION:*** *Agreement - Jurisdiction of arbitrator - Dispute raising questions of law and fact - Whether within purview and jurisdiction of arbitrator - Arbitration Act 1952, ss. 8, 12, 13, 22(1)*

***CONTRACT:*** *Agreement - Agreement to arbitrate - Application for declaratory orders to enforce arbitration clause and to appoint arbitrator - Whether justiciable matters - Whether dispute properly within jurisdiction of arbitrator - Writ action by defendant arising from same contract - Whether could bar arbitral proceedings - Arbitration Act 1952, ss. 8, 12, 13, 22(1)*

***CIVIL PROCEDURE:*** *Striking out - Striking out originating summons on ground of duplicity - Agreement to arbitrate - Summons by plaintiff to enforce arbitration clause - Writ action by defendant arising from same contract - Whether summons tainted with duplicity - Whether summons and writ involved different prayers - Whether there was abuse of process - Rules of High Court 1980, O. 18 r. 19*

The parties had entered into a building contract ('sub-contract') whereby the defendant agreed to undertake certain building and construction works for the plaintiff. It was a term of the sub-contract that the parties would refer to arbitration any dispute as might arise between them in regard to the sub-contract. Completion of the works was delayed whereupon disputes arose between the parties in respect of: (i) whether the defendant was entitled to a portion of the retention fund (ii) whether the defendant was in breach of the sub-contract and was liable to compensate the plaintiff; (iii) whether the defendant was entitled to extension of time; and (iv) whether the plaintiff could set-off the amount if any owed to the defendant ('the dispute').

The plaintiff took the view that the dispute ought to be arbitrated upon, and consequently took the necessary steps to enforce the arbitration clause. *Inter alia*, the plaintiff issued a 'notice to arbitrate' as well as a 'notice to concur in appointment of arbitrator' naming Dato' Peh Swee Chin ('Dato Peh') as

the potential arbitrator. The steps notwithstanding, the defendant refused to arbitrate and intimated to the plaintiff that they would proceed with a writ action instead. The defendant then showed the plaintiff an unsealed copy of the said writ, whereupon the plaintiff filed the originating summons herein ('OS') and applied for an order to refer the dispute to arbitration and for the appointment of Dato' Peh as arbitrator. The defendant retorted by filing the writ action in the High Court claiming damages against the plaintiff and two others ('the writ action'). Having filed the writ action, the defendant applied to strike out the OS under O. 18 r. 19 Rules of the High Court, arguing that: (i) the plaintiff ought to have applied for a stay of the writ action instead of starting a fresh action *vide* the OS; (ii) the issues on arbitration ought to be decided in the writ action (ii) the OS was tainted with duplicity; and (iii) the writ action was justified as it sought to raise questions of law pertaining to the sub-contract.

**Held:**

**[1]** The nature and form of the writ action is merely a disguise in an attempt to stultify arbitration proceedings. It would appear that the alleged 'point of law' is the issue of 'lifting the corporate veil' *vis-a-vis* the plaintiff and KMS Integrated Sdn Bhd. The issue of 'lifting the corporate veil' is however not purely a question of law as it also involves issues of fact. It is trite law that an arbitrator has jurisdiction to determine questions of law and fact. (pp 564 c & 565 b-c)

**[1a]** A dispute should only be heard by the court if the points of law involved are substantial and complex. In the present case, the points of law are ordinary issues being disputes on retention of monies, extension of time, liquidated ascertained damages and interim certificates. It is unquestionable that Dato' Peh or any other suitable person appointed as arbitrator is more than qualified to make determinations of question of law and fact. Furthermore, under s. 22(1) of the Arbitration Act 1952, an arbitrator may state any question of law for the decision of the High Court. Hence, the objection against the arbitration based on alleged questions of law is misconceived. (p 574 a, b & f)

**[1b]** The alleged issue of law of 'lifting the corporate veil' between KMS Integrated Sdn Bhd and the plaintiff is without basis as such an issue was academic and premature at this stage and should be decided only after the issue of quantum and liability has been arbitrated. The defendant had also contradicted themselves when they said that they were the same legal entity but at the same time averred that KSM Integrated was a third party. (p 574 h)

**[2]** In this case, a dispute or difference has arisen as to fall within the ambit of the arbitration clause. Since the events have triggered the arbitration clause, the plaintiff has no alternative but to proceed with the process of arbitration and consequently to issue the OS in order to enforce the arbitration clause and obtain a court order for the appointment of the sole arbitrator. The issues as addressed by the plaintiff in the OS are justiciable by this court. The plaintiff, clearly, should not be faulted for electing to take a more proactive measure to enforce the arbitration clause rather than wait for the intended suit to be filed by the defendant and then take steps to stay the proceedings in the writ action. (pp 566 e-g & 568 f-h)

**[3]** For the enforcement of the arbitration clause herein, the substantive principles governing stay of proceedings pending arbitration are applicable. It is trite law that, given a dispute, a court must compel the parties to adhere to the terms of the arbitration agreement entered into by them even though it may appear from the evidence that the plaintiff is unlikely to succeed before the arbitrator. The onus is on the defendant to show why the plaintiff should not proceed with arbitration. (p 569 g-h & 570 c)

**[4]** The argument raised by the defendant of duplicity of proceedings is devoid of merit. This is because the cause of action by the defendant against the plaintiff in the writ action is markedly different from the orders prayed for by the plaintiff against the defendant in the OS. The writ action was brought against the plaintiff and 2 others and is basically a claim for damages against *inter alia* the plaintiff. The OS on the other hand is an application for declaratory relief on the interpretation of the sub-contract and to enforce the arbitration clause including a prayer for the appointment of arbitrator under s. 12 of the Arbitration Act 1952. The OS and the writ action are totally different in nature and there is no duplicity of proceedings. (p 571 d-f)

**[4a]** Although there were some overlapping ancillary issues between the OS and the writ action, this alone will not entitle the defendant to striking out. It is to be noted that the prayers and issues raised in the writ action have not been determined on the merits and the merits are to be determined by arbitral proceedings. Therefore it is not an abuse of process to file the OS herein. (p 572 d)

**[5]** In order to succeed the plaintiff has to demonstrate that it is "ready and willing to do all things necessary to the proper conduct of the arbitration". On the facts the plaintiff has so done by proceeding with the notice to arbitrate and the notice to concur and by filing the OS herein. Since all the requirements pursuant to the Arbitration Act 1952 and the arbitration clause have been fulfilled, Order in Terms of the OS ought to be granted to the plaintiff. (p 570 e-f)

*[Order in terms of plaintiff's application; defendant's action to strike out dismissed.]*

**Case(s) referred to:**

*Accounting Publications Sdn Bhd v. Ho Soo Furniture Sdn Bhd [1999] 1 CLJ 765 CA* ***(refd)***

*Berkshire Senior Citizens Housing Association Ltd v. McCarthy E Fitt Ltd 15 BLR 27* ***(dist)***

*Bonnin v. Neame [1901] B 764* ***(dist)***

*Bulk Oil (Zug) AG v. Trans-Asiatic Oil Ltd, Same v. Same [1973] 1 LlL Rep 129* ***(foll)***

*Clegg v. Clegg [1980] Ch 200* ***(dist)***

*Durable Concrete Sdn Bhd v. TH Universal Builders Sdn Bhd [2000] 6 CLJ 469 HC* ***(dist)***

*Edward Goh Geok Seng v. Dunstan Dumpangol & Ors [1989] 2 MLJ 119* ***(refd)***

*Gasing Heights Sdn Bhd v. Aloyah Abd Rahman & Ors [1996] 3 CLJ 695 HC* ***(dist)***

*Heyman and Another v. Darwins, Limited [1942] AC 356* ***(foll)***

*Lesco Development Corp Sdn Bhd v. Malaysia Building Society Bhd [1998] 2 MLJ 184* ***(refd)***

*Pengiran Othman Shah Pengiran Mohd Yusoff & Anor v. Karambunai Resorts Sdn Bhd (formerly known as Lipkland (Sabah) Sdn Bhd & Ors [1996] 1 CLJ 257 CA* ***(refd)***

*Raja Zainal Abidin Raja Haji Tachik & Ors v. British-American Life & General Insurance Bhd [1993] 3 CLJ 606 SC* ***(refd)***

*Sakapp Commodoties (M) Sdn Bhd v. Cecil Abraham (executor of the estate of Loo Cheng Ghee) [1998] 4 CLJ 812 CA* ***(refd)***

*San Kong Letrik Sdn Bhd v. Lembaga Letrik Negara Tanah Melayu [1992] 1 CLJ 190; [1992] 3 CLJ (Rep) 540 HC* ***(dist)***

*Seloga Jaya Sdn Bhd v. Pembenaan Keng Ting (Sabah) Sdn Bhd [1994] 2 CLJ 716 SC* ***(refd)***

*Tan Kok Cheng & Sons Realty Co Sdn Bhd v. Lim Ah Pat (t/a Juta Bena) [1996] 1 CLJ 231 FC* ***(refd)***

*Taunton-Collins v. Cromie and Anor [1964] 2 All ER 332* ***(dist)***

*Teknik Cekap Sdn Bhd v. Nirwana Indah Sdn Bhd [1996] 4 MLJ 154 HC* ***(refd)***

*The Lyn Country Sdn Bhd v. EIC Clothing Sdn Bhd & Anor [1996] 4 CLJ 828 HC* ***(refd)***

*Trans Resources Corporation Bhd v. Sanwell Corporation & Anor (No 2) [1999] 3 CLJ 215 HC* ***(refd)***
*University of Reading v. Miller 75 BLR 99* ***(dist)***
*Wickham v. Harding [1859] LJ Ex 215* ***(refd)***
*WY Chin v. Sarahon Construction Sdn Bhd [1994] 4 CLJ 233 HC* ***(dist)***
*Yip Chee Seng & Sons Bhd v. Ornaconstruction Corp Sdn Bhd [1999] 6 CLJ 550 HC* ***(foll)***
*Yip Chee Seng v. Ornaconstruction Corp Sdn Bhd [1998] 7 MLJ 655 HC* ***(refd)***

**Legislation referred to:**
Arbitration Act 1952, ss. 8, 12, 13, 20(2), 22(1)
Rules of the High Court 1980, O. 18 r. 19

*For the plaintiff - VS Chan (CW Lam); M/s Lee & May*
*For the defendant - GH Khoo (Ashok Kumar)*

*Reported by WA Sharif*

## JUDGMENT

**Faiza Tamby Chik J:**
The plaintiff has commenced the originating summons dated 23 May 2000 (encl. 1) ("OS") herein seeking two pronged prayers which in summary are as follows:

(a) a declaration on the interpretation of the sub-contract (as defined at para. 6 hereinbelow) entered into between the plaintiff and the defendant that any dispute or difference between the plaintiff and defendant in regard to any matter or thing arising out of the sub-contract should be referred to arbitration forthwith. The issues in dispute include the following issues whether:

(i) the defendant is entitled to one half moiety of the retention fund;

(ii) the defendant has breached the terms and conditions of the sub-contract including the delay in completion of the works and the defendant's liability to make good and/or to repair the defects of the works;

(iii) the defendant's liability to indemnify and/or pay the plaintiff for any loss, expense or damage suffered or incurred by the plaintiff including liquidated ascertained damages, losses, expenses and any other damage;

(iv) the damages (general and special damages) to be paid to the plaintiff by the defendant including interest;

(v) further and/or in the alternative the plaintiff's right to set-off any amounts owing to the defendant (if any) against the amounts owing by the defendant to the plaintiff.

(b) that Dato' Peh Swee Chin or any other suitable person should be appointed as arbitrator in respect of the dispute between the plaintiff and the defendant.

The facts which are not in dispute are as follows: The plaintiff was appointed as main contrator by KMS Integrated Sdn Bhd ("KMS Integrated") to build and complete the superstructure works for a proposed 19 storey Hotel at Lot 866-876 Section 57, Jalan Changkat Bukit Bintang/Tengkat Tong Shin Kuala Lumpur ("the works") as per the letter of award dated 17 March 1998 and the terms of the main contract dated 15 September 1998 together with the addendum and supplementary clauses therein ("main contract") – (encl. 2, exh. "YSW1", pp. 26-65). The plaintiff originally sub-contracted the works to Satujaya Sdn Bhd ("Satujaya") pursuant to the letter of award dated 18 March 1998 and sub-contract dated 28 March 1998. However before the commencement of the works by Satujaya, the plaintiff, Satujaya and the defendant entered into a deed of novation dated 30 March 1998 wherein Satujaya was released and discharged of their obligation and the defendant assumed all the rights and obligations in place of Satujaya. As a result of the deed of novation the sub-contract is now between the plaintiff (as the main contractor) and defendant (as the sub-contractor) wherein the terms and conditions of the sub-contract are identified in the letter of award dated 18 March 1998 and the sub-contract dated 28 March 1998 between the plaintiff and Satujaya which are confirmed in a subsequent letter of award dated 31 March 1998. For ease of reference, the contract between the plaintiff and defendant as stated hereinabove shall be referred to as the "sub-contract".

In Diagramatic Form the arrangement between the parties are as follows:

KMS Integrated Sdn. Bhd. ("Employer")

Terms of Contract - Main Contract

KMS Builders Sdn Bhd ("Plaintiff - Main Contractor")

Terms of Contract Sub-Contract

Hazama Corporation ("Defendant-Sub-Contractor")

Pursuant to the terms of the sub-contract, the defendant is required to, *inter alia*:

(i) Observe, perform and comply with all the provisions of the main contract - cl. 3(a) of the conditions of sub-contract (encl. 2 p. 101), and

(ii) Indemnify and save harmless the plaintiff against any breach, non-observance by the defendant of the provision so the main contract - cl. 3(b) of the conditions of sub-contract (encl. 2 p. 101).

For the purpose of this OS, the sub-contract also contains an arbitration clause - cl. 20 (encl. 2 p. 108) "the arbitration clause") which states:

> In the event of any dispute or difference between the Contractor ("the Plaintiff") and the Sub-Contractor ("the Defendant"), whether arising during the execution or after the completion or abandonment of the Sub-Contract Works or after the determination of the employment of the Sub-Contractor under this Sub-Contract (whether by breach of in any other manner), in regard to any matter or thing of whatsoever nature arising out of this Sub-Contract or in connection therewith, then either party shall give to the other notice in writing of such dispute or difference and such dispute of difference shall be and is hereby referred to the arbitration of such person as the parties hereto agree to appoint as Arbitrator.
>
> Arbitrator's award shall be final and binding on both parties.

It is irrefutable that "a dispute or difference" has arisen between the plaintiff and the defendant in regard to any matter or thing of whatsoever nature arising out of the sub-contract. The issues that have arisen between the plaintiff and the defendant *inter alia* are as follows:

(i) Dispute over one half moiety of retention monies.

The defendant claims that it is entitled to receive one half moiety of the retention moneys amounting to RM1,115,570.79 – (encl. 2, para. 3 - 10). The defendant has demanded payment of one half moiety culminating in a letter of demand issued by the defendant's solicitors dated 15 March 2000 (encl. 2, exh. "YSW10", P. 167). The plaintiff contends that one half moiety is not payable to the defendant on the grounds that:

(a) the defendant's claim is premature as the plaintiff has not received any payment from KMS-Integrated ("the employer") in accordance with the terms of cl. 11(a) conditions of sub-contract ("pay when paid clause");

(b) the defendant has delayed in the completion of the works and is liable to pay the plaintiff damages including liquidated ascertained damages ("LAD") pursuant to cl. 6.11 letter of award (encl. 2,

exh. "YSW2", P. 72), cl. 3(b) conditions of sub-contract (encl. 2, exh. "YSW2", P. 101). The damages claimed by the plaintiff against the defendant exceeds RM6,190,698.64 (and exceeds any claims (which is denied) of the defendant against the plaintiff (encl. 2, para 8.2, pp 12-13). The issue of delay and the LAD payable is related to the issue relating to the dispute as to the extension of time.

(c) the plaintiff has a right to set off for any money due from the plaintiff to the defendant (which is denied) (including any retention money) against any sum or sums which the defendant is liable to pay to the plaintiff under this sub-contract – cl. 12 conditions of sub-contract (encl. 2, exh. "YSW2" p. 105).

(ii) Dispute over extension of time.

The defendant has been dissatisfied with the decision rendered by the architect, EDA akitek, wherein the architect has certified in the certificate of non-completion dated 4 September 1999 (encl. 2, exh. "YSW6", p. 153) that the works ought to have been completed by 3 September 1999 and that LAD of RM25,000 is payable per diem. The architect has also certified that the date of practical completion was on 30 November 1999 (encl. 2, exh. "YSW7", p. 156). The defendant claims (which is being disputed) that the completion date should be as at 22 November 1999 (encl. 2, exh. "YSW16", p. 254) and issued numerous letters of request and demands dated 29 December 1999 (encl. 2, p. 240), 5 January 2000 (encl. 2, p. 241), 20 January 2000 (encl. 2, p. 242), 25 February 2000 (encl. 2, p. 263), 16 February 2000 (encl. 2, p. 265), 4 March 2000 (encl. 2, exh. "YSW18", pp. 268 and 270) 8 March 2000 (encl. 2, p. 272), 9 March 2000 (encl. 2, p. 274). The requests by the defendant for further extension of time were duly forwarded by the plaintiff in accordance with the terms of the sub-contract (encl. 2, exh. "YSW19", pp. 276 - 280). All such request by the defendant and the plaintiff have been rejected unequivocally by the architect as per their letter dated 15 March 2000 (encl. 2, exh. "YSW20", p. 281). The defendant is now demanding that the plaintiff grant extension of time in place of the architect! The plaintiff contends that it has no power to make decisions on this issue without the consent of the architect (encl. 2, exh. "YSW21", pp. 284, 285, 288, 289 and the plaintiff's reply at pp. 286 - 287, 290 - 291).

(iii) Dispute over liquidated ascertained damages.

As a result of the defendant's claim that the extension of time should be extended to 22 December 1999 (which is denied by the plaintiff, as the plaintiff is bound by the certificate of non-completion issued by the architect. The architect has certified that the time for completion is only extended up to 3 September 1999), the issue of LAD payable is also now in dispute.

(iv) Dispute over defects in the works.

The plaintiff contends that some parts of the works are defective as shown in encl. 2, exh. "YSW22", pp. 294 - 332.

(v) Disputes over additional claims under interim certificate 17 and 18 (the plaintiff denied this).

From the amended writ and amended statement of claim dated 9 May 2000 in the Kuala Lumpur High Court Suit No. D1-22-595-2000 between Hazama Corporation ("the defendant in the OS" and KMS Builders Sdn Bhd ("the defendant in the OS""), KMS Integrated Sdn Bhd and Orion Express Sdn Bhd ("the writ action") (of which a sealed copy thereof has only been served on the plaintiff's solicitors on 27 June 2000 (encl. 6, para. 5) that the defendant is now claiming for additional sums (which are denied) under the Interim Certificates No. 17 and 18 – (encl. 2, exh. "YSW15", para 27(1)(e) of the amended statement of claim in the writ action).

(vi) Disputes for alleged loss and expense due to the alleged delay by the plaintiff (the plaintiff denied this).

Again pursuant to the writ action the defendant is now claiming for loss caused by the alleged delay by the plaintiff (which is denied) but the plaintiff is now contending that the delay is caused by the defendant and not otherwise.

(vii) Disputes for remaining work which is unpaid (the plaintiff denied this).

Further pursuant to the writ action the defendant is apparently claiming for remaining works which is still uncertified to date. The plaintiff maintains that such claims are premature as the alleged claims are still uncertified.

Prior to the writ action, the disputes raised by the defendant were only limited to the claims for one half moiety – para. 9.1 above, extension of time – para. 9.2 above, liquidated ascertained damages – para. 9.3 above, defects – para. 9.4 above. As a result of these disputes, letters have been issued and replied to accordingly between the plaintiff's and defendant's solicitors highlighting the dispute between the parties (the plaintiff's solicitors encl. 2, exh. "YSW13", pp. 175 - 184; the defendant's solicitors encl. 2, exh. "YSW14", pp. 185 - 195). The plaintiff *via* their solicitors has always maintained since 25 March 2000 that the disputes should be arbitrated (encl. 2, exh. "YSW3", p. 178). However in a letter in reply dated 27 March 2000 (encl. 2, exh. "YSW14", p. 191), the defendant (*via* its solicitors) in breach of the arbitration clause enquired whether the plaintiff's solicitors had authority to accept service of process. In fact in a later letter dated 4 April 2000 (encl. 2, p. 192) the defendant indicated that it has allegedly filed an action on 31 March 2000 which is reiterated in another letter dated 12 April 2000 (encl. 2, pp. 194 - 195). It is observed that the plaintiff was rather surprised with the blatant act by the defendant in breaching the arbitration clause in the face of the plaintiff's contention that the proper forum is arbitration (see letters dated 25 March 2000 (encl. 2, p. 178), 30 March 2000 (encl. 2, pp. 179 - 181). Consequent upon the disputes arising between the parties and in accordance with the arbitration clause – Clause 20 of the sub-contract, the plaintiff proceeded to issue a notice to arbitrate dated 7 April 2000 wherein the plaintiff requested a list of arbitrator to be proposed by the defendant within seven days of the notice to arbitrate - (encl. 2, exh. "YSW13", pp. 182 - 183). Despite the receipt of the Notice to Arbitrate, the defendant still refused to arbitrate the dispute nor nominate any proposed arbitrator(s) of its choice – see letter dated 12 March 2000 (encl. 2, exh. "YSW14", pp. 193-195). In compliance with the arbitration clause, the plaintiff proceeded to issue a notice to concur in appointment of arbitrator dated 25 April 2000 ("notice to concur"), naming Dato' Peh Swee Chin ("Dato' Peh") as potential arbitrator. Dato' Peh has indicated in a letter dated 13 April 2000 that he is agreeable to act as arbitrator and that there is no potential conflict for him acting in that capacity (encl. 2, exh. "YSW24", pp. 338). In fact at no time has the defendant challenged the capability of Dato' Peh as arbitrator to arbitrate the dispute between the parties. The notice to concur was issued pursuant to s. 13 of the Arbitration Act 1952 wherein the defendant is required to concur in the appointment of arbitrator within 21 days from the date thereof, the notice to concur was to expire on or before 17 May 2000. On 10 May 2000 prior to the expiry of the period of the notice to concur, the plaintiff received an unsealed copy of the writ action, which was only sent as an advance copy of the writ action as a matter of courtesy only and the defendant's solicitors confirmed that they should only serve the same when the sealed copy

of the writ action were extracted – (encl. 22, exh. "A", pp. 9 - 10). It is clear that the delivery of the unsealed copy of the writ action is not regarded as proper service of originating process which fact is confirmed by the plaintiff's solicitors in a letter dated 12 May 2000 – (encl. 12, exh. "B", p. 11). Upon the due expiry of the 21 days of the notice to concur as required under s. 12 of the Arbitration Act 1952, the plaintiff filed this OS for the declaratory orders sought herein and the order for the appointment of the arbitrator. The sealed copy of the OS was served on the defendant on 7 June 2000. The plaintiff was only served with the sealed copy of the writ action only on 27 June 2000 being a date after the date of service of the sealed copy of the OS (on 7 June 2000).

It is observed that since 25 March 2000 the plaintiff has maintained the stance that the dispute should be arbitrated. In the letter dated 7 April 2000 (encl. 2, p. 184) it was stated unequivocally by the plaintiff's solicitors that:

> We have received our client's instructions that your client's (Defendant) proposed court action is contrary to Clause 20 of the Sub-Contract entered into between your client dated 28th March 1998 (Sub-Contract) wherein it has been agreed that all disputes arising or in connection to the Sub-Contract is to be referred to arbitration pursuant to the Arbitration Act, 1952. We have at all material times expressly stated that our client is ready and willing to have the disputes referred to arbitration so as to achieve a speedy resolution of disputes between the parties.
>
> In this respect we enclose herewith the Notice to Arbitration of even date, the contents of which are self-explanatory.
>
> Without prejudice to our client's contention that the dispute should be referred to arbitration, we have instructions to accept service of process.

A notice of arbitration dated 7 April 2000 (encl. 2, pp. 182 - 183) was enclosed therein, delineating the issues to be referred to arbitration. In the subsequent letter in reply dated 12 April 2000 from the defendant's solicitors, the defendant admitted that, with respect the notice of arbitration:

> The proper thing for your client to do is to refer your client's request to Court for a decision.

which is the very thing that the plaintiff proceeded to do by filing the OS herein for the declaratory prayers together with the order for the appointment of arbitrator. I am made aware that whether the writ action was filed since 31 March 2000 is an unconfirmed fact because the plaintiff's solicitors were only forwarded by an "advance copy" of the unsealed amended writ and amended statement of claim dated 9 May 2000 as a matter of courtesy only on 10 May 2000 after the expiry of the notice to arbitrate and after the issuance

of the notice to concur. Also nowhere does the writ action state that the writ action was filed on 31 March 2000 (encl. 2 pp. 196). The writ action merely states that the amended statement of claim was filed on 9 May 2000. This fact is confirmed in the affidavit affirmed by Hideo Yamafuji dated 11 August 2000 (encl. 8) at para. 4 exh. "HY1".

To the defendant's contention that the writ action filed by the defendant seeks relief against third parties and involves issues of law it is observed that any issue on the termination of the writ action (ie, Kuala Lumpur High Court Suit No. D1-22-595-2000) should be left entirely to the forum designated to hear the issues therein ie, the High Court in the commercial division. With respect the writ action, it is observed that there are no third party claims; it is merely a suit commenced by Hazama Corporation (the defendant herein) against three defendants, of which the plaintiff is only one of them. I think the nature and form of the writ action is merely a disguise in an attempt to stultify arbitration proceedings. It would appear that the alleged "point of law" is the issue of "lifting the corporate veil" *vis-a-vis* the plaintiff and KMS Integrated Sdn Bhd. The issue of "lifting the corporate veil" is not purely a question of law alone but also involves issues of fact as admitted by the defendant in the amended statement of claim at para. 5 as follows:

> 5. Plaintif akan menghujah bahawa:
>
> (a) pada masa yang material Defendan Pertama dan Kedua adalah sebuah unit ekonomi tunggal dalam hal keadaan tersebut;
>
> (b) pada masa yang material Defendan Pertama adalah ejen Defendan Kedua dalam hal keadaan tersebut;
>
> (c) pada masa yang material Defendan Pertama adalah topeng Defendan Kedua dalam hal tersebut,
>
> dan akan memohon untuk menyingkap/menyelaras tadbir perbadanan Defendaan Pertama dan Kedua.
>
> Butir-Butir.
>
> (a) Defendan Pertama adalah sebuah anak syarikat milik penuh Defendan Kedua;
>
> (b) Defendan Pertama dan Kedua berkongsi pengarah yang sama;
>
> (c) Defendan Pertama dan Kedua berkongsi alamat berdaftar yang sama;
>
> (d) Defendan Pertama dan Kedua mempunyai pekerja yang sama.

> Butir-butir lain yang relevan mengenai perkara tersebut di atas akan disediakan setelah penzahiran dibuat dan setelah Plaintif mengendalikan pemeriksaan penuh ke atas dokumen para Defendan.

Therefore by virtue of the defendant's admission that there is a need for discovery and inspection it proves that it is not purely a question of law but a mixed issue of fact and law which is within the purview of the arbitrator. It is trite law that an arbitrator has jurisdiction to determine questions of law and fact – see *Yip Chee Seng v. Ornaconstruction Corp Sdn Bhd* [1999] 6 CLJ 550 and as such any alleged issue of "lifting the corporate veil" is a question of law and fact which can be determined by the arbitrator. In any event even if the matter were a pure question of law, it is trite law that in itself does not preclude the court from exercising its discretion to stay court proceedings. This is propounded succinctly in the case of *Teknik Cekap Sdn. Bhd v. Nirwana Indah Sdn Bhd* [1996] 4 MLJ 154 which held at p. 164 that:

> ... The mere fact that the subject matter of a submission involves question of law or is of nature eminently suitable for trial in a court of law is not sufficient ground for refusing to stay the action ... .

It is irrefutable that a "dispute or difference" has arisen between the parties as stated in para. 9 above. For the purposes of determining whether a dispute or difference has arisen, there is no requirement that the dispute or difference should be *bona fide* – see *Tan Kok Cheng & Sons Realty Co Sdn Bhd v. Lim Ah Pat (t/a Juta Bena)* [1996] 1 CLJ 231, ie, it is no part of the court's function to decide whether the plaintiff has raised a *bona fide* dispute. The strengths or weakness of the issue raised by the parties must await the decision of the tribunal especially chosen by the parties (*ie*, arbitration) to decide the differences that have arisen between them. It is clear from the Court of Appeal decision of *Accounting Publications Sdn Bhd v. Ho Soo Furniture Sdn Bhd* [1999] 1 CLJ 765 at pp. 773-774 Gopal Sri Ram JCA said:

> But as to what the meaning of the word 'dispute' is, *Gujarat State Co-operative Land Development Ltd v. PR Mankad & Anor* AIR 1979 SC 1203 was followed in which the word 'dispute' was defined in the following terms:
>
> > The term "dispute" means a controversy having positive and negative aspects. It postulates the assertion of a claim by one party and its denial by the other.
>
> The arbitration clause in our case as emphasised earlier is very wide and does not only speak of all disputes but also all differences and questions which may arise not at any specific time but at any time.

At p. 776 Gopal Sri Ram, JCA said:

> The agreement to arbitrate in the present instance uses the phrase 'dispute or difference concerning the contract' which in our judgment, is language of wide import. It is certainly wide enough to include the kind of controversy that existed between the plaintiff and the defendant immediately prior to the issuance of the writ. Although there may not be a dispute, yet there may be a difference between the parties concerning the contract. A failure to agree may not be a dispute; yet it is a difference. However, the judicial commissioner in the present appeal only directed her mind to the word 'dispute' but omitted from consideration the words 'or difference'. Had she done so, she would have found that the factual matrix before her amounted to a 'difference' even if, as she held, that it did not amount to a 'dispute'.
>
> In *F & G Sykes (Wesses) Ltd v. Fine Fare Ltd* [1967] 1 Lloyd's Rep 53, an arbitration clause had in it the words 'if any difference shall arise'. Danckwerts LJ in the course of delivering his concurring judgment said:
>
> The word 'differences' seems to me to be particularly apt for a case where the parties have not agreed: Viscount Dunedin said in the case which was quoted to us of *May and Butcher Ltd v. The King* [1934] 2 KB 17: '... a failure to agree ... is a very different thing from a dispute.' But it seems to me that the word 'difference' is particularly apt to describe that situation.

I am of the view that a dispute or difference has arisen falling within the ambit of the arbitration clause based upon the assertions and counter arguments raised by both sides as stated clearly at paras. 9 above. The "disputes and differences" are also clearly demonstrated in the letters issued to and from the plaintiff and defendant's solicitors respectively as exhibited in encl. 2 exh. "YSW13" and "YSW14" the validity thereof have not been denied by the defendant in any event. Hence since the events have triggered the arbitration clause, the plaintiff has no other alternative but is now compelled to proceed with the process of arbitration which includes the issuance of a notice to arbitrate followed by the necessary notice to concur and to nominate the proposed arbitrator being Dato' Peh Swee Chin. Upon the expiry of the required 21 days after the issuance of a notice to concur, the plaintiff is then to proceed expeditiously to issue the OS filed herein to enforce the arbitration clause and to obtain a court order for the appointment of the sole arbitrator being Dato' Peh Swee Chin pursuant to s. 12 of the Arbitration Act 1952 which the plaintiff has done. The notice to concur expired on 17 May 2000 and the OS was filed on 23 May 2000 (encl. 12, para. 5). In the case of *Yip Chee Seng & Sons Bhd v. Ornaconstruction Corp Sdn Bhd* [1998] 2 MLJ 655, the plaintiff in that case after proceeding with the appointment of an arbitrator applied to court for a declaration that it was entitled to refer the dispute to arbitration in accordance with its relevant arbitration clause in that case. In that case Augustine Paul

JC (as he was then) held that the originating summons filed by the plaintiff in that case for declaratory orders seeking the enforcement of the arbitration clause was justiciable by the court and made the appropriate declaratory order in favour of the plaintiff. In fact at p. 674 Augustine Paul JC (as he was then) stated:

> It is my view that the answer to this issue is provided by Swee Pte Ltd relied on by the defendant. In that case Rhind J referred to the equivalent Brunei provision and said at p. 357:
>
> > The particular part of the Specific Relief Enactment 1957 on which the plaintiff relies is the final sentence of s. 20:
> >
> > > And, save as provided by the law relating to civil procedure in force in the State of Brunei no contract to refer a controversy to arbitration shall be specifically enforced.
>
> Far from being a provision inconsistent with England's Arbitration Act 1950, that part of the Specific Relief Enactment 1957 just cited is no more than declaratory of what is in fact the common law of England on arbitration clauses. Paragraph 385 of 36 *Halsbury's Law of England* (3rd Ed) states:
>
> > the court does not enforce the specific performance of agreements to refer to arbitration.
>
> That same paragraph continues, though:
>
> > An indirect method of enforcing performance of such an agreement is, however, provided by the Arbitration Act 1950 which gives the court discretion to stay an action in respect of any dispute which the parties have by writing agreed to refer to arbitration.

Contrary to the argument advanced before me by both parties it is my view that s. 20(2) in actual fact reinforces arbitration as an alternative method of dispute resolution. If a contract to refer a controversy to arbitration can be enforced specifically then the arbitration clause will lose its object and purpose as the dispute will end up being resolved in the court with the result that the very foundation of the Act will crumble. It will amount to the court substituting its own machinery for the machinery which has been agreed on by the parties as authorised by the Act. Thus the role of s. 20(2) is to ensure that such contracts are not subject to specific performance so as to ensure that the arbitration clause is complied with. In fact s. 6 of the Act serves to complement this provision by enabling proceedings instituted in court to be stayed. Section 20(2) therefore does not prohibit a party from enforcing his contractual right by arbitration where there is provision for such a course. Section 12 of the Act which authorises the court to appoint an arbitrator is in line with this argument.

It is also observed that pursuant to Practice Directions No. 1 of 1989, para 3.3.4, the appellate and special powers division is allocated to hear all matters with respect the Arbitration Act 1952. Furthermore besides the declaratory order, the plaintiff is also seeking an order for the appointment of an arbitrator pursuant to s. 12 of the Arbitration Act 1952. Section 12 of the Arbitration Act 1952 provides:

> 12. In any of the following cases:
>
> (a) where an arbitration agreement provides that the reference shall be to a single arbitrator, and all the parties do not, after differences have arisen, concur in the appoint of an arbitrator;
>
> (b) ...
>
> (c) ...
>
> (d) ... any party may serve the other parties or the arbitrators, as the case may be, with a written notice to appoint or, as the case may be, concur in appointing, an arbitrator, umpire or third arbitrator, and if the appointment is not made within twenty-one clear after the service of the notice, the High Court may, on application by the party who gave the notice, appoint an arbitrator, umpire or third arbitrator, who shall have the like powers to act in the reference and make an award as if he had been appointed by consent of all parties.

Section 8 of the Arbitration Act 1952 provides also that:

> s. 8 Unless a contrary intention is expressed therein, every arbitration agreement shall, if no other mode of reference is provided, be deemed to include a provision that the reference shall be by a single arbitrator.

Hence since the events have triggered the arbitration clause, the plaintiff is compelled to proceed expeditiously with arbitration which it has done by seeking the consent of Dato' Peh Swee Chin and proceeding to file the OS herein for the declaratory orders and the order for appointment of Arbitrator. It is observed that one of the objections taken by the defendant is that the plaintiff should have applied for a stay of the writ action pending the disposal of the issues by arbitration, rather than start a fresh action by filing the OS herein. It is submitted that in this case the plaintiff should not be faulted for electing to take a more proactive measure to enforce the arbitration clause rather than to await any intended suit to be filed by the defendant and then to take steps to stay the proceedings in the writ action (which in any event has been delayed and the sealed copy thereof was served after the filing and service of the sealed OS herein). The court still has the jurisdiction and power to grant the orders prayed for herein, as made clear in the authorities of *Yip Chee Seng, supra*.

The reason why the plaintiff proceeded with the OS herein was because:

(a) The plaintiff has indicated arbitral proceedings since 25 March 2000;

(b) Then in breach of the arbitration clause, the defendant said in a letter 4 April 2000 (encl. 2, exh. "YSW14", p. 192) that they have filed a writ action since 31 March 2000;

(c) However from the date of the expiry of the notice to arbitrate until the expiry of the notice to concur, the plaintiff had not received any sealed copy of such alleged writ action;

(d) The plaintiff only received an unsealed copy of the writ action on 10 May 2000 which apparently was only filed on 9 May 2000 (encl. 8, exh. "HY1") and not on 31 March 2000 as originally claimed by the defendant;

(e) It is trite law that an unsealed copy of the writ action is not good and proper service and is to be disregarded at law;

(f) In view of the delay in the potential arbitral proceedings and the conflict of facts whether in fact the writ action had been filed, the plaintiff was compelled to address the issue and take the proactive measure to enforce the arbitration clause by way of the OS herein.

I think if the issues addressed in the OS is justiciable by this court, the plaintiff should not be faulted for proceeding with the OS herein rather than to await any action by the defendant itself. Furthermore, the defendant has stated that the proper steps to be taken by the plaintiff is to apply for a stay in the writ action rather than to file an OS. However if only such a step were taken by the plaintiff, the plaintiff would merely be parrying the blows of the defendant in the writ action and I think that the writ action was filed with the intention to delay the enforcement of the plaintiff's right and to set back the plaintiff's position only.

It must be noted that for the enforcement of the arbitration clause herein the substantive principles of law governing stay of proceedings pending arbitration are applicable, save that any reference to "plaintiff' in the relevant cases for stay of proceedings is to be substituted with reference to "defendant" herein and vice versa. It is trite law that, given a dispute, a court must compel the parties to adhere to the terms of the arbitration agreement entered into by them even though it may appear from the evidence presented upon the application that the plaintiff is unlikely to succeed before the arbitrator. In *Accounting Publication*'s case, *supra* at p. 772 Gopal Sri ram JCA said:

> It is settled law that, given a dispute, a court must compel the parties to adhere to the terms of the arbitration agreement entered into by them even though it may appear from the evidence presented upon the application for a stay that the defendant is unlikely to succeed before the arbitrator.

The approach of the court will be that those who make a contract to arbitrate their disputes should be held to their bargain for, in the oft quoted words of Martin B in *Wickham v. Harding* [1859] LJ Ex 215:

> A bargain is a bargain, and the parties ought to abide by it, unless a clear reason applies for their not doing so.

In fact the onus is on the defendant in this OS to show why the plaintiff should not proceed with arbitration. In *Seloga Jaya Sdn Bhd v. Pembenaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 CLJ 716 at p. 728 the Supreme Court said:

> It is well known that if a party can satisfy the court that the conditions for the grant of a stay under s. 6 of the Act are satisfied, it does not *ipso facto* follow that it will be entitled, as of right, to a stay, for the court still retains a discretion to refuse it. But, generally, as the judge rightly recognised, the approach of the court will be that those who make a contract to arbitrate their disputes, should be held to their bargain for, in the oft-quoted words of Martin B in *Wickham v. Harding*, 'A bargain is a bargain, and the parties ought to abide by it, unless a clear reason applies for their not doing so.

In order to succeed in the OS herein the plaintiff has to demonstrate that it is "ready and willing to do all things necessary to the proper conduct of the arbitration. " – *Accounting publications* case, *supra*,. I think the plaintiff has so done by proceeding with the notice to arbitrate and the notice to concur and filing the OS herein. Hence therefore since all the requirements pursuant to the arbitration act and the arbitration clause have been fulfilled by the plaintiff order in terms of the OS should be granted to the plaintiff.

It can be seen that the defendant's objections are purely on questions of law which are as follows:

(i) By filing the OS, the plaintiff is causing multiplicity of proceedings apparently on the grounds that the subject matter of the OS is sufficiently connected with or allied to the subject matter of the writ action. Therefore it is necessary in the interests of justice that the plaintiff should have applied for a stay of the writ action pending the disposal of the issues by arbitration, rather than start a fresh action – (encl. 3, para. 5-6). This it is alleged is tantamount to an abuse of process (which is denied);

(ii) The plaintiff has no cause of action – (encl. 3, para. 8(a);

(iii) The plaintiff by filing this OS is attempting to extort a relief which would not have been granted in the writ action because of multiplicity of parties and questions of law are involved and the declaration sought by the defendant in the writ action to lift the corporate veil of the plaintiff and its parent company will be frustrated - encl. 3, para. 8(b) and (c).

I think there are no multiplicity of proceedings in any event because:

(i) The writ action brought by the defendant against the plaintiff and two other persons ie, the parties are different. The writ action is basically a claim for damages against *inter alia* the plaintiff as prayed for in the amended statement of claim – para. 27(1)(a)(d) - (g) (encl. 2 exh. "YSW15", pp. 220 - 221);

(ii) The OS on the other hand is an application by the plaintiff against the defendant only seeking for declaratory relief on the interpretation of the sub contract and to enforce the arbitration clause including a prayer for the appointment of arbitrator.

It is obvious that the argument raised by the defendant of duplicity of proceedings is devoid of merit, because the cause of action by the defendant against the plaintiff in the writ action is markedly different from the orders prayed for by the plaintiff against the defendant herein. Although in the writ action, the plaintiff would be required to stay the proceedings therein there is an overlap of issues to be decided, the plaintiff in the writ action is merely thwarting further proceedings against a claim for monies by the defendant whereas in the OS, the plaintiff is seeking declarations on the effect of the Arbitration Clause and appointment of arbitrator pursuant to s. 12 of the Arbitration Act 1952. It is clear as night and day that the OS and writ action are totally different in nature and there is no duplicity of proceedings. In the case of *The Lyn Country Sdn Bhd v. EIC Clothing Sdn Bhd & Anor* [1996] 4 CLJ 828 the court held:

> (5) The basis of multiplicity of actions for the motion is devoid of merit since the issues were all different and they were between either of the respondents in the hearing of the petition (see p. 219C).

Also in a similar case of *Edward Goh Geok Seng v. Dunstan Dumpangol & Ors* [1989] 2 MLJ 119 the defendant in that case attempted to strike out the plaintiff's suit based upon O. 18 r. 19 Rules of the High Court on the grounds that the plaintiff's prayers were being adjudicated in two other suits pending before the High Court at Kota Kinabalu, Mohammad Noor J said at p. 120:

> I am satisfied that the same prayers have been asked for and substantially the same issues have been raised in the said suits. This alone will not entitle the defendants to succeed. Other factors will have to be considered as well. Firstly, the suits are all pending before the same High Court though due to administrative arrangement they are to be heard before different judges. Secondly, one of the prayers and issues raised in the suits have been determined on merits. Thirdly, the suits are capable of being consolidated on the grounds that the rights to relief claimed arise out of the same transaction and/or series of transactions and further by reason of the aforesaid two factors it is desirable that an order for consolidation may be made. The suits can be consolidated to the extent that Suit 162 be ordered to stand as a counterclaim. In the final analysis I am satisfied that there is no improper purpose on the part of the plaintiff in filing the present action. Therefore, I cannot see how any question of abuse of the process of the court can be said to arise.

In the similar vein, although there are some ancillary issues which overlap (ie, the issue on the arbitration clause), this alone will not entitle the defendant to succeed in striking out. The OS and writ action are all pending in the High Court though due to administrative arrangements they are to be heard before different judges. Secondly the prayers and issues raised in the writ action has not been determined on its merits and the merits are to be resolved by arbitral proceedings. Henceforth it is not an abuse of process by filing the OS herein. Based upon the principles of *Edward Goh*'s case, the defendant's application to strike out should also be dismissed. Furthermore it is clear that at para. 6 of encl. 3, the defendant contends that the plaintiff should apply for a stay of proceedings in the writ action. From the onset, it is submitted that the proceedings in the writ action is irrelevant for the purposes of the hearing of the OS before me. Be that as it may, it is submitted that since the date of service of the writ action, the plaintiff in the writ action has entered conditional appearance dated 28 June 2000 and filed an application to set aside the writ or in the alternative for a stay of the writ action (encl. 11, exh. "HY1", para. 2 p. 6) which has yet to be disposed off. Logically as a corollary to the application for a stay of proceedings in the writ action, the effect thereof would be that there will be no further proceedings in the writ action which means to say that there will be only one active proceeding left before the High Court which is the OS itself. Henceforth, the issue of multiplicity of proceedings is negated since only the OS exist in fact and the writ action is stayed. Therefore based upon the defendant's own admission itself that the writ action should be stayed means that any potential problem of multiplicity no longer exists. In the case of *Lesco Development Corp Sdn Bhd v. Malaysia Building Society Bhd* [1998] 2 MLJ 184, there were two actions filed, a writ action for repayment of the loan (personal action) and an originating summons for foreclosure proceedings (action *in rem*) with respect the same facility. The Federal Court held that, at p. 86 it was undesirable to allow a situation where

two different courts would try and determine the same issues arising between the same parties relating to the same matter. However, instead of striking out one of the proceedings, the court postponed the OS until the disposal of the writ action therein. In the same vein, since the writ action as submitted by the defendant should be stayed, the OS can be proceeded forthwith. Also it is argued that the issue of alleged "multiple proceedings" have been caused by the defendant itself by failing to proceed with arbitral proceedings in breach of the arbitration clause. If the dispute were ventilated at arbitration, no other court proceedings would have been necessary. In *Trans Resources Corporation Bhd v. Sanwell Corporation & Anor (No 2)* [1999] 3 CLJ 215 at p. 230 Kamalanathan Ratnam J said:

> In effect the second defendant's arguments are almost similar to those raised by the plaintiff. The plaintiff relied on *The Pine Hill* [1958] 1 Lloyd's Rep 146 and *Taunton Collins v. Cromie & Anor* [1964] 2 All ER 332 to support its argument on multiplicity of proceedings. However these two cases were considered by Kerr J in Bulk Oil and which I had adverted to earlier. In distinguishing *The Pine Hill* and *Taunton Collins* with the facts in *Bulk Oil* Kerr J said at p. 136:
>
> > ... in both these cases the multiplicity of proceedings covering the same issues did not arise solely from a choice made by the party wishing the whole dispute to be dealt with by litigation. In the first case the difficulty was due to the party which was applying for the stay, ie, the charterers. In the second case the difficulty was due to a defence raised by a party which was not concerned with any arbitration clause, ie, the architect seeking to blame the contractors. In neither case was the difficulty in which the plaintiff found himself due to his own procedural choice.

In fact the defendant in applying to strike out the OS herein and requiring that the issue on arbitration be decided in the writ action wherein the writ action is stayed is intended to set back the potential arbitration and to delay matters further.

The defendant objected that the plaintiff is extorting a relief which it is not entitled to obtain in the writ action. I think that such an objection raised by the defendant that the OS should be struck off on the ground that the plaintiff is trying to extort a relief which is not entitled to obtain in the writ action, is mere supposition and is a prejudgment of issues since the writ action and any application for a stay of proceedings have not been disposed off – (encl. 6, para. 6). The statements made by the defendant that the plaintiff is trying to extort a relief which it is not entitled to obtain in the writ action is tantamount to subverting the writ action proceedings by the OS herein by requiring this

court to make a decision with respect to the writ action as well. In any event be that as it may the defendant also alleges that a stay of proceedings in writ action would not be granted since there are questions of law involved ie, it is alleged that there is a need to lift the corporate veil between the plaintiff and KMS Integrated (the employer). I am of the opinion that it is trite law that an arbitrator is empowered to determine questions of law. A dispute should be heard by a court only if the points of law involved is substantial and complex. In *Heyman and Another v. Darwins, Limited* [1942] AC 356 at p. 389 Lord Wright LJ stated at p. 389:

> In my opinion, these are not sufficient to justify staying the action. The judge seems to rely on the language which he quotes from Lord Parker in *Bristol Corporation v. John Aird, Ltd.* to the effect that "Everybody knows that with regard "to the construction of an agreement it is absolutely useless "to stay the action, because it will only come back to the court "on a case stated." Any expression of opinion falling from that great judge must receive the most careful consideration, but it would not be safe to tear it from its context and give it a general application. I need not quote authorities for what has been said so often, that under a general submission the arbitrator is appointed to decide issues both of fact and of law. In the background, indeed, is the court's jurisdiction to set aside an award if it is bad in law on its face, and the opinion of the court on issues of law may be invoked by means of cases stated under the Acts of 1889 and 1934, but, if the submission is general, it will require some substantial reason to induce the court to deny its due effect to the agreement of the parties to submit the whole dispute, whether it includes both fact and law or is limited to either fact or law.

In the instant case, the points of law are in fact ordinary issues faced by arbitrators regularly being disputes on retention monies, extension of time, liquidated ascertained damages, interim certificates. It is unquestionable that Dato' Peh or any other suitable person appointed as arbitrator is more than qualified to make determinations of questions of law and of fact. Furthermore based on s. 22(1) of the Arbitration Act 1952, an arbitrator may state any question of law arising in the course of the reference for the decision of the High Court. In this respect the arbitrator may choose to refer the question of law to the High Court, as he thinks fit. In any event, I think even if the defendant should attempt to "lift the corporate veil" so to speak, such arguments should be made after the disputes on liability and quantum between the plaintiff and defendant have been arbitrated since the issues of "lifting of the corporate veil" merely goes into the issue of enforcement of the potential arbitral award. Hence I conclude the objections against arbitration based on alleged questions of law is misconceived.

The defendant also alleges that there are multiple parties involved in the writ action. I am of the view that this issue is best ventilated at the writ action since there are no multiple parties in this OS as it only involves one plaintiff and one defendant. Be that as it may, the multiple parties in the writ action is brought about by the defendant themselves and is not caused in any event by the plaintiff. At no time has the plaintiff shifted any blame arising from the dispute or difference, as being caused by any third party. The defendant has full control of the commencing and filing the writ action herein and the defendant by filing the writ action against the plaintiff and KMS integrated and joining the developer Orion Express Sdn Bhd and causing multiple parties is also solely within the control of the defendant. Hence I conclude that the defendant should not be allowed to rely on its own action in its attempt to introduce other parties solely for the purpose of attempting to defeat the arbitration clause. In short the defendant should not be entitled to rely on their own breach of the arbitration clause and the defendant cannot now be seen to take advantage of its own default. In *Trans Resources Corp Sdn Bhd v. Sanwell Corp & Anor (No 2)* [1999] 3 CLJ 215, the court said at p. 224:

> I find that it is the plaintiff and the second defendant who, through their own default by not resorting to the procedural choice of seeking arbitration, have given rise to the issue of multiplicity of proceedings. The plaintiff and the second defendant cannot now be seen to take advantage of their own default.

Furthermore I think there are authorities including the *Trans Resources Corp. & Anor* case (above) which have held that despite multiple defendants in so far as the dispute *vis-a-vis* the one defendant and the plaintiff who were subject to an arbitration clause, the action between them were stayed pending arbitration whereas the claim by the plaintiff against the other defendants continued in the court proceedings. This was ordered despite objections by the plaintiff in that case that there is a risk of multiplicity of proceedings which may result in inconsistent finding of facts and decisions by different tribunals. In *Tan Kok Cheng & Sons Realty Co Sdn Bhd v. Lim Ah Pat (t/a Juta Bena)* [1996] 1 CLJ 231 at p. 239 the Federal Court said:

> It is implicit in the foregoing passage that, given an agreement to arbitrate and the satisfaction of the conditions set out in s. 6 of the Act, a court should lean towards the grant of a stay. This, in our judgment, is the correct approach. The residual discretion which the court retains is limited to a very narrow class of cases, such as those involving fraud or where there is, on a proper construction of the arbitration clause, no dispute that falls within its purview or where the third party procedure under the rules of court will most probably be resorted to. In the last of these situations, it is trite that an arbitrator has no jurisdiction to order third party proceedings.

It is also a misconception for the defendant to contend that this OS is collateral to the writ action. I think the cause of action in the writ action (being a claim for damages) and the OS herein being heard are different. It is observed furthermore that the OS was served in advance to the writ action.

I am of the opinion the defendant's application to strike out the plaintiff's OS under O. 18 r. 19 of the Rules of the High Court 1980 (RHC) should be dismissed with costs because it is trite law that the discretionary power to dismiss an action summarily under O. 18 r. 19 of RHC 1980 and under the inherent jurisdiction of the court is a drastic power which should only be exercised in plain and obvious cases. In *Pengiran Othman Shah bin Pengiran Mohd Yusoff & Anor v. Karambunai Resorts Sdn Bhd (formerly known as Lipkland (Sabah) Sdn Bhd & Ors* [1996] 1 CLJ 257, Siti Norma Yaakob JCA said:

> The discretionary power to dismiss an action summarily under O. 18 r. 19 and under the inherent jurisdiction of the court is a drastic power which should only be exercised in plain and obvious cases, as the effect of the exercise of such a power is to shut the plaintiff altogether from pursuing his claim. (See *Tractors (M) Bhd v. Do Chee Hing* [1975] 2 MLJ 1.) Whether a case is plain or obvious does not depend upon the length of time it takes to argue the case, but that when the case is argued on the affidavit evidence available, it becomes plain and obvious that the case has no chance of success. (See *Mackay & Anor v. Essex Area Health Authority & Anor* [1982] 2 QB 1166; [1982] 2 All ER 771; [1982] 2 WLR 890.)
>
> When a question of law becomes an issue, this in itself will not prevent the court from granting the application, for as long as the court is satisfied that the issue of law is unarguable and unsustainable, it may proceed to determine that question. (See *Bank Negara Malaysia v. Mohd. Ismail & Ors.* [1982] 1 MLJ. 400.).
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> Likewise, where the affidavit evidence discloses a dispute of facts, such facts must be analysed and if they are found to be inconsistent with undisputed contemporary documents or inherently improbable in themselves, the court is entitled to reject those facts and proceed upon the undisputed contemporaneous documentary evidence.

In *Raja Zainal Abidin bin Raja Haji Tachik & Ors v. British-American Life & General Insurance Bhd* [1993] CLJ 606 the Supreme Court held:

> The High Court always has an inherent jurisdiction to prevent abuse of its process irrespective of whether it is expressly called for or not in an application under O. 18 r. 10 of the Rules of the High Court 1980 unless such application is limited solely to the ground that any pleading does not disclose a reasonable cause of action or defence as the case may be.

It is apparent therefore that this is not a clear cut case justifying the striking out of the OS filed herein.

With reference to the case of *Gasing Heights Sdn Bhd v. Aloyah bte Abd Rahman & Ors* [1996] 3 CLJ 695 referred to the instant case, it is to be borne in mind that the developer in that case filed an action against the residents for alleged malicious prosecution and abuse of process as a cause of action. The developer failed to file a summons-in-chambers for striking out for abuse of process in the first action for *certiorari* filed by the residents. On these grounds the court struck out the developer's action. In this respect the principles of *Gasing Heights* case, must be read with caution and not plucked out from the case without regard to the facts and circumstances of the dicta enunciated by the learned judge therein. It is to be borne in mind that the *Gasing Heights* case can be easily distinguished as the plaintiff in this OS is not filing a suit for abuse of process neither is the plaintiff entitled to file any application to strike out under writ action as the plaintiff does not wish to submit to the jurisdiction of the court therein. As to the case of *Durable Concrete Sdn Bhd v. TH Universal Builders Sdn Bhd* [2000] 6 CLJ 469 quoted by the defendant, it is distinguishable as well because in that case there were two cases on the same issues raised therein, one filed by the defendant (of which the merits *vis-a-vis* the injunction have been ventilated and subject to an appeal) and one by the plaintiff for the contrary injunctive prayers against the defendant. In the instant situation, there is no multiplicity of proceedings and also by the fact that the plaintiff has applied to *inter alia*, stay the proceedings in the writ action and the merits of the dispute is not ventilated whatsoever at this stage of the proceedings as the matter should be referred to arbitration. The case of *San Kong Letrik Sdn Bhd v. Lembaga Letrik Negara Tanah Melayu* [1992] 3 CLJ 5450 can also be distinguished because the dispute (ie, a tortious claim) was not within the ambit of the contractual dispute clause in that particular arbitration clause. Furthermore the learned judge held that the 1st defendant in that case was not ready, willing and able to proceed with arbitration and that there were elements of fraud involved in that case. I think that the instant situation is different in nature because the plaintiff has done everything possible to proceed with arbitration including the filing of the OS herein and there is no allegation of fraud mentioned at all. The case of *WY Chin v. Sarahon Construction Sdn Bhd* [1994] 4 CLJ 233 is not applicable because it is a case of reference by the arbitrator himself for a case stated under s. 22 of the Arbitrator Act 1952. Moreover there is no third party claim in this OS nor in the writ action (it being the defendant's claim only). The case of *Bonnin v. Neame* [1901] B 764 can be distinguished, because the stay was refused because the arbitrators, in that case, have expressed strong opinions in their respective appointor's favour. It is undisputable that Dato' Peh is impartial in this case.

The case of *Clegg v. Clegg* [1980] Ch 200 was a case dealing with the construction of the terms of the contract only whereas in the instant situation, the potential arbitral proceedings would involve issues of fact and law involving issues regarding time for completion, extensions of time, damages suffered and liability. The case of *University of Reading v. Miller* 75 BLR 99 can be distinguished as stay of proceedings was refused in that case because one of the contracts (ie, the PSA contract) in that case did not contain any arbitration clause. Furthermore the 2nd defendant had proceeded with third party proceedings against Miller as well. It is trite that if third party proceedings are involved, the stay would not be granted. No such situation exists in the instant case. The case of *Taunton-Collins v. Cromie and Anor* [1964] 2 All ER 332 can also be distinguished. In that case the stay of proceedings was refused because the main action was brought by the plaintiff against the architect for a tortious claim, the architect in the defence put the blame on the contractors. The contract between the plaintiff and the contractors contained an arbitration clause. As such the joining of the contractors as second defendants in that case was merely ancillary to the main claim which was a tortious action against the architect. In view thereof the stay of proceedings in favour of arbitration was disallowed because of the multiple parties by the inclusion of the second defendant was caused by the first defendant architect in their defence and not otherwise. Because of the defence the plaintiff was compelled to join the contractor as the second defendant. Furthermore the cause of action was the same ie, claim for defective works. In the instant case it is clear that the multiple party problem is brought about by the defendant in joining other parties in the writ action as defendants. I am of the opinion that the analysis as mentioned above is approved in the case of *Bulk Oil (Zug) AG v. Trans-Asiatic Oil Ltd, Same v. Same* [1973] 1 LIL Rep 129 at p. 136 where the defendant filed a counterclaim and made allegations with respect to agreement which contained an arbitration clause. The Plaintiff in that case then applied for a stay of proceedings based upon the arbitration clause. The court allowed the plaintiff's application for stay and distinguished *Taunton*'s case, supra on the grounds that in *Taunton*'s case the difficulty (against the stay) was due to a defence raised by a party which was not concerned with any arbitration clause. In the instant case, *Taunton*'s case does not apply as the defendant (who is concerned with the arbitration clause and is bound by it) should not be allowed to rely on its own breach of the arbitration clause in denying the plaintiff's right to proceed with the OS.

I therefore conclude that even in the writ action it is not improper at law that any court action brought by the plaintiff against one defendant be stayed without prejudicing the existing proceedings against other defendants. This is made clear in the Malaysian case of *Trans Resources*, (infra). In the same vein *Berkshire*

*Senior Citizens Housing Association Ltd v. McCarthy E Fitt Ltd* 15 BLR 27 is distinguishable because the architect (second defendant) pleaded that the fault was caused by engineers who were not parties to the action which is similar to *Taunton*'s case. The issue of whether the plaintiff and KMS Integrated Sdn Bhd are the same legal entity is within the purview/jurisdiction of the arbitrator in view of the width of the arbitration clause which provides that "any dispute or difference ..." in regard to any matter of thing of whatsoever nature arising out of this sub-contract or in connection therewith is to be referred to arbitration. Alternatively the arbitrator may refer this subsidiary issue (if necessary) as a special case pursuant to s. 22 of the Arbitration Act 1952 to the High Court. In any event the alleged declaration on the alleged issue of law of lifting the corporate veil between KMS Integrated Sdn Bhd. and the plaintiff is I think without basis because:

(i) contractually the plaintiff and the defendant entered into a sub-contract wherein it was made clear from the onset that the relationship between KMS Integrated Sdn Bhd and the plaintiff is that of employer-main-contractor whereas the defendant is the sub-contractor. And the defendant has received payments from the plaintiff based on the terms of the sub-contract (ie, Interim Certificate No. 1-16) and as such is estopped from disputing that the plaintiff and KMS Integrated Sdn Bhd are separate legal entities;

(ii) This issue of alleged "lifting of corporate veil" (which is denied) is academic/premature at this stage and should only be decided after the issue of liability and quantum has been arbitrated. In short the issue of "lifting the corporate veil" is redundant if liability and quantum is not established. See the case of *Sakapp Commodoties (M) Sdn Bhd v. Cecil Abraham (executor of the estate of Loo Cheng Ghee)* [1998] 4 CLJ 812;

(iii) the plaintiff's submission at paras. 6.3(i) and 6.3(ii) - (iv), 6.6 - 6.8 are inconsistent because in the same breath the defendant contends that KMS Integrated Sdn Bhd and the plaintiff is the same legal entity (which is denied) and on the other hand goes on to say that KMS Integrated Sdn Bhd is a third party. I am of the view that if the alleged corporate veil between KMS Integrated Sdn Bhd and the plaintiff is lifted the effect thereof means that KMS Integrated Sdn. Bhd. and the plaintiff is the same legal entity of which the arbitration clause will truly encompass and include the KMS Integrated Sdn. Bhd. and as such the issue of multiple parties will not arise.

To the defendant's contention that the plaintiff's OS is frivolous and vexatious and/or an abuse of process of court because the plaintiff's OS herein would lead to multiplicity of proceedings, it is observed that the plaintiff has applied to set aside the writ action and/or stay the proceedings in the writ action hence there is no multiple proceedings *vis-a-vis* the High Court. The plaintiff has an obligation to take all the necessary steps to enforce the arbitration clause which has been done by filing the OS herein. The plaintiff and/or through its solicitors were not entirely sure whether the writ action had been filed despite the bare allegation made by the defendant that the writ action had been filed since 31 March 2000 since there was no actual proof that it had been filed as the sealed copy of the writ action was only served after the sealed OS herein was filed and served. I think the risk of multiplicity of proceedings is not sufficient to deny the stay of court proceedings since the multiplicity of proceedings is caused by the defendant themselves in the writ action by breaching the arbitration clause, (see the case of *Trans Resources Corp Sdn Bhd v. Sanwell Corp & Anor (No 2)*) and proceedings against the three defendants. It is clear that any alleged "cause of action" against any of the three defendants in the writ action are distinct and different in nature ie,:

(a) the alleged claims (which is denied) against the KMS Builder Sdn Bhd are pursuant to the sub-contract which is subject to the arbitration clause;

(b) the action against the 2nd defendant in the writ action (KMS Integrated Sdn Bhd) is for declaration only on the alleged ground that the 1st defendant and the 2nd defendant therein are the same party (which is denied);

(c) the action against the 3rd defendant in the writ action (Orion Express Sdn. Bhd.) (which is denied) is for alleged quantum merit;

and as such the plaintiff in the writ action should not have joined the three defendants together in the same proceedings and the alleged "multiplicity of parties" as claimed by the defendant herein is actually intentionally designed by the plaintiff in the writ action in an attempt (*albeit* unsuccessfully) to circumvent the effects of the arbitration clause of which such acts should not be condoned by the court. As such the risk of multiplicity of proceedings (which has been denied) should be borne by the defendant.

To the defendant's contention that the plaintiff's OS is collateral to the writ action, it is observed that in no way is the plaintiff's OS collateral to the writ action because:

(i) the sealed copy of the writ action was filed and served after the filing and service of the OS;

(ii) the plaintiff's OS is in accordance with the arbitration clause;

(iii) the plaintiff's stance is to proceed with arbitration hence there is no alternative but to set aside/stay the writ action and to proceed with the declarations sought under the OS filed herein. Based on the case of *Edward Goh Geok Seng v. Dunstan Dumpangol & Ors* [1989] 2 MLJ 119, it is not an abuse of process if similar reliefs were in two different sections of the court due to administrative arrangements. In any event since the plaintiff is applying to, *inter alia*, stay the writ action, the issue of multiple proceedings is negatived.

In the premises I hereby order that the defendant's application filed herein be dismissed with costs and grant order in terms of the OS filed herein.